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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 600

ROBERT SWAIN,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

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ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA.

BRIEF AND ARGUMENT FOR

RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I.

WHETHER A PETITIONER, WHOSE CASE HAS BEEN BEFORE THE SUPREME COURT ON A PREVIOUS WRIT OF CERTIORARI AND WHOSE CONVICTION HAS BEEN AFFIRMED, IS ENTITLED TO A NEW WRIT OF CERTIORARI ON GROUNDS NOT ASSERTED IN HIS ORIGINAL PETITION FOR CERTIORARI AND ON GROUNDS WHICH WERE NOT PROVED OR RAISED IN THE LOWER COURT.

II.

WHETHER THE IMPOSITION OF SENTENCE BY THE TRIAL JURY IS CONTRARY TO THE 8TH AND 14TH AMENDMENTS.

III.

WHETHER THE STATEMENT OF THE PROSECUTOR IN HIS FINAL ARGUMENT THAT NO WORD OF DENIAL HAD COME FROM THE STAND WAS A COMMENT ON PETITIONER'S FAILURE TO TAKE THE STAND IN HIS OWN DEFENSE CONTRARY TO THE 14TH AMENDMENT.

IV.

WHETHER THE INELIGIBILITY OF WOMEN FOR JURY SERVICE IN ALABAMA IS A DENIAL OF PETITIONER'S RIGHTS UNDER THE 14TH AMENDMENT.

STATEMENT

In his original Petition for Certiorari (October Term 1963, No. 1093, later changed to October Term, 1964, No. 64), and his brief on the merits in that case, the Petitioner con-

tended that he was denied due process of law and the equal protection of the laws in violation of the 14th Amendment when indicted, convicted, and sentenced by Grand and Petit Juries in a county where (A), the State always strikes a token number of Negroes on the trial venires, with the result that Negroes never serve on trial juries, and (B), Negroes have been summoned for jury duty in only token numbers and the State has offered no explanation for the small proportion called. These questions were decided against the Petitioner in *Swain* v. *Alabama*, 380 U. S. 202, 13 L. Ed. 2d 759, 85 S. Ct. ....., Rehearing Denied 381 U. S. 921, on the grounds that Petitioner had failed to prove racial discrimination in compiling the jury roll or in selection of the venires or trial jury panels in violation of the 14th Amendment, and that Petitioner had failed to prove systematic use by the prosecutor of peremptory challenges against Negroes in violation of his Constitutional rights.

Nowhere in his original Petition for Certiorari, in his brief on the merits in that case, or in his counsel's oral argument before this Court did he raise the questions now sought to be presented, nor were they raised in the lower court at the time of trial.

He now seeks to raise new questions as an afterthought.

ARGUMENT

I.

A PETITIONER, WHOSE CASE HAS BEEN BEFORE THE SUPREME COURT ON A PREVIOUS WRIT OF CERTIORARI AND WHOSE CONVICTION HAS BEEN AFFIRMED, IS NOT ENTITLED TO A NEW WRIT OF CERTIORARI ON GROUNDS NOT ASSERTED IN HIS ORIGINAL PETITION FOR CERTIORARI AND ON GROUNDS WHICH WERE NOT PROVED OR RAISED IN THE LOWER COURT.

Matters other than the question of Federal jurisdiction or evidence contained in the record will not be considered by the Court where they were not presented and decided in the lower court. *United States* v. *Classic*, 313 U. S. 299, 85 L. Ed. 1368, 61 S. Ct. 1031, Rehearing Denied, 314 U. S. 707, 86 L. Ed. 565, 62 S. Ct. 51. The essential Federal question must have been set up in the Court at the proper time and in a proper manner. *Herndon* v. *Georgia*, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794, Rehearing Denied, 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 82.

The Court will not permit an accused to elect to pursue one course at the trial and then, when that proves to be unprofitable, insist on review that the course which he rejected at the trial be reopened to him. *Johnson* v. *United States*, 318 U. S. 189, 87 L. Ed. 704, 63 S. Ct. 549, Rehearing Denied, 318 U. S. 801, 87 L. Ed. 1164, 63 S. Ct. 826. See, also, *Ex parte Spies*, 123 U. S. 131, 31 L. Ed. 80, 131 S. Ct. 131; *Baldwin* v. *Kansas*, 129 U. S. 151, 32 L. Ed. 640, 52 S. Ct. 57; *Morrison* v. *Watson*, 154 U. S. 927, 38 L. Ed. 927, 111 S. Ct. 115.

We would like to again point out that the Petitioner has been represented throughout by counsel of his own choosing and that two of such counsel, namely, Orzell Billingsley, Jr., and Peter A. Hall, represented him on the trial, on the appeal to the Supreme Court of Alabama, on the original Petition for Certiorari in this case, and represent him on the present Petition for Certiorari.

As this Court pointed out in its previous opinion in this case, ". . . we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws" and ". . . a showing that Negroes have not served during a specified time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State."

The Petitioner did not show such participation at the time of trial or on his Motion for a New Trial. He should not be allowed to reopen the case at this late date to attempt to show what he had an opportunity to bring out at the proper time. If a defendant in a criminal case is allowed to pursue the procedure attempted here, there could never be an end to a criminal prosecution. This statement applies as well to the other questions presented by his new Petition for Certiorari, none of which was raised at the time of trial, on Motion for New Trial, on appeal to the Supreme Court of Alabama, or on the previous hearing of this case.

II.

THE IMPOSITION OF SENTENCE BY THE TRIAL JURY IS NOT CONTRARY TO THE 8TH AND 14TH AMENDMENTS.

While it is true that at common law the jury in criminal proceedings either return a special verdict, setting forth all the circumstances of the case and praying the judgment of the Court, or a general verdict of guilty or not guilty, and the punishment is fixed by the Court, there is nothing in the Constitution which prevents a state from providing for the jury to fix the punishment to be imposed on the Defendant. We are not cited to anything to the contrary.

The Petitioner argues that because more Negroes than Whites have been executed for rape, this shows a discriminatory application of a statute fair upon its face. It is difficult to understand the reasoning behind such an argument in view of the fact that in each of the cases cited, the penalty was imposed by a separate jury or court and since it is axiomatic that no two cases have exactly the same factual basis. If we are to follow the argument of the Petitioner, then the jury system loses its meaning and effectiveness and this Court would be the final arbiter of the punishment to be meted out in each individaul case. This is not in accord

with our system of government where the trial courts determine guilt or innocence and fix punishment within Constitutional limits.

If the statistics cited by the Petitioner as to the racial identification of those executed for crimes of violence prove anything, they prove that Negroes are more prone to commit such crimes than are Whites.

The argument that the majority of the states no longer retain the death penalty in rape cases and that, therefore, the imposition of the death penalty in such cases constitutes cruel and unusual punishment in violation of the 14th Amendment is untenable. It must be borne in mind that seventeen states, plus the Federal Government and the District of Columbia, still retain the death penalty for rape. Whether such penalty should be retained or abolished is a matter for decision by the several legislative bodies and is not for the courts to determine. If this were not so, the whole structure of our system of government would fall and the legislative functions of the government would be taken over by the courts. Such an argument itself is contrary to the basic concepts of our Constitutional form of government.

III.

THE STATEMENT OF THE PROSECUTOR IN HIS FINAL ARGUMENT THAT NO WORD OF DENIAL HAD COME FROM THE STAND WAS NOT A COMMENT ON PETITIONER'S FAILURE TO TAKE THE STAND IN HIS OWN DEFENSE CONTRARY TO THE 14TH AMENDMENT.

Code of Alabama 1940, Title 15, Section 305, as amended by Act. No. 124, approved June 23, 1949, Acts 1949,, page 150, provides as follows:

> "On the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness;

and his failure to make such a request shall not create any presumption against him, nor be the subject of comment by counsel. If the solicitor or other prosecuting attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within thirty days from entry of the judgment."

As interpreted by the Supreme Court and Court of Appeals of Alabama, the statute does not prohibit a prosecutor from drawing reasonable inferences from the evidence presented in a case, and statements to the effect that the evidence is uncontradicted or undenied are not prohibited by the statute. See *Welch* v. *State*, 263 Ala. 57, 58, 81 So. 2d 901; *Thompson* v *State*, 41 Ala. App. 353, 357-358, 132 So. 2d 386; *Dixon* v. *State*, 39 Ala. App. 575, 105 So. 2d 354; *Littlefield* v. *State*, 36 Ala. App. 507, 63 So. 2d 565, Cer. Den. 258 Ala. 532, 63 So. 2d 573; *Dickey* v. *State*, 21 Ala. App. 644, 111 So. 426.

In *Welch* v. *State*, supra, the following was approved as a correct statement of the law:

"It is generally held that a statement by the prosecuting attorney to the effect that the evidence for the State is uncontradicted or undenied is not a comment on the defendant's failure to testify."

In *Swain* v. *State*, 275 Ala. 508, 156 So. 2d 368, the Supreme Court of Alabama specifically held that the prosecutor's argument in the instant case was not violative of Section 305, Title 15, as amended, supra.

This case is not analogous to *Griffin* v. *California*, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. ....., because that case was based on a provision of the California Constitution which permitted the Court and counsel to comment on the failure of the Defendant to explain or deny any evidence or

facts in the case and permit such matters to be considered by the Court or the jury.

See, also, Annotation in 68 A. L. R. 1127.

IV.

THE INELIGIBILITY OF WOMEN FOR JURY SERVICE IN ALABAMA IS NOT A DENIAL OF PETITIONER'S RIGHTS UNDER THE 14TH AMENDMENT.

While at common law women were not eligible to serve as jurors, there is no doubt that the states have the power to make them eligible. The 14th Amendment to the Constitution of the United States does not, in effect, prohibit the states from denying to women the right to serve on juries and does not render void a statute providing for the selection of males alone as jurors. *Strauder* v. *West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *State* v. *Emery*, 224 N. C. 481, 31 S. E. 2d 858, 157 A. L. R. 441.

As this Court said in *Hoyt* v. *Florida*, 368 U. S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159:

> "We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, 25 L. Ed. 664, 666, to the effect that a state may constitutionally 'confine' jury duty 'to males.' This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the court. See *Fay* v. *New York*, supra (332 U. S. at 289, 290), and had been reflected, until 1957, in congressional policy respecting jury service in the Federal courts themselves."

Whether women should or should not be allowed to serve on juries in a particular state is a matter for determination by the Legislature of that state and not for the courts to decide.

The statement made in the last paragraph of the Petitioner to the effect that females certainly possess attitudes with respect to the crime of rape not possessed by men is pure speculation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the Attorneys for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of October, 1965, I served the requisite number of copies of the foregoing Brief and Argument in Opposition to Petition for Certiorari upon Jack Greenberg, James M. Nabrit, III, Michael Meltsner, Frank Heffron and Melvyn Zarr, Suite 2030, 10 Columbus Circle, New York, New York 10019, Orzell Billingsley, Jr., and Peter A. Hall, 1630 4th Avenue, North, Birmingham, Alabama, and Anthony G. Amsterdam, 3400 Chestnut Street, Philadelphia, Pennsylvania, Attorneys for Petitioner, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to them at the addresses given.

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